STATE OF MICHIGAN

IN THE SUPREME COURT

MARTIN B. BREIGHNER III and
KATHRYN BREIGHNER

Plaintiffs/Appellants,

-vs-

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC., a Michigan non-profit corporation,

Defendant/Appellee.
_____/

Supreme Court
No. 123529

Court of Appeals No. 243618

Lower Court No. 01-6716 CZ

Trial Judge:
Hon. Charles W. Johnson

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AMICUS CURIAE BRIEF IN SUPPORT OF THE APPEAL OF APPELLANTS/PLAINTIFFS

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STATEMENT OF QUESTIONS PRESENTED:

Amicus Curiae, Michigan Press Association, adopts the Statement of Questions Presented by Plaintiffs/Appellants, as amended.

STATEMENT OF FACTS

Amicus Michigan Press Association adopts the statement of facts of Appellants/Plaintiffs.

From those facts, Amicus Michigan Press Association would call attention to the following facts.

The Michigan High School Athletic Association, hereinafter MHSAA, was incorporated as a non-profit membership corporation in 1972. App. P. 14a. Its Articles of Incorporation state that its purpose is:

> To create, establish and provide for, supervise and conduct interscholastic programs throughout the state consistent with the educational values of the high school curriculums, the interest in physical welfare and fitness of the students participating therein, by giving the opportunity to participate in athletics designed to meet the needs and abilities of all and to make and adopt such rules and regulations and interpretation thereof to carry out the foregoing and to further provide for the training and registering of officials and to publish and distribute such information consistent therewith and to do any and all acts and services necessary to carry out the intent hereof. Court of Appeals Opinion, App. P 46a-47a.

Consistent with its Articles of Incorporation the vast majority of MHSAA members are Michigan Public School Districts. App. P. 14a. Furthermore, its corollary is also true: nearly every public school in the State of Michigan is a member of MHSAA. It is the only game in town.

Michigan schools, public and private, wishing to participate in a MHSAA tournament must pass a resolution in the following form.

> The Board of Education/Governing Body hereby delegates to the Superintendent[1] or his/her designee(s) the responsibility for the supervision and control of said activities, and hereby accepts the Constitution and By-Laws of said

[1] Superintendent of Public Instruction who is an ex officio member of the MHSAA.

> association and **adopts as its own the rules, regulations and interpretations** (as minimum standards), as published in the current HANDBOOK and qualifications as published in the BULLETIN **as the governing code under which the said school(s) shall conduct its program of interscholastic activities** and agrees to primary enforcement of said rules, regulations, interpretations and qualifications. In addition, it is hereby agreed that schools which host or participate in the association's meets and tournaments shall follow and enforce all tournaments policies and procedures. Court of Appeals Opinion, App. P. 47a and App. p. 31a.

MHSAA is the successor organization to an entity of the same name that was originally a part of state government. In its original incarnation its handbook, rules and regulations were part of the Administrative Code of the State of Michigan. Court of Appeals Opinion, App. P. 46a

MHSAA is primarily funded by revenues from gate receipts from athletic tournaments it sponsors for its member schools and their students. App. P. 15a. In fiscal year ending July 2000, $6,158,319.00 of its total revenue of $6,866,406.00 came from athletic tournament and meet income. Court of Appeals Opinion, Dissent, p. 55a. These tournaments are conducted on the premises of member schools, the vast majority of which are public schools and a school must be a member of MHSAA to participate in these tournaments. App. P. 15a.

The school hosting the tournament sells the tickets, collects the receipts and remits the monies collected to MHSAA after deducting the host's expenses. App. P. 22a and 25a.

MHSAA itself is operated by a Representative Council whose members are employees of Michigan public schools save two: a representative of the parochial schools of Michigan and a representative of the Superintendent of Public Instruction for the State of Michigan who is an ex officio member. MHSAA has a staff of some 22 employees who handle day to day operations. See Exhibit A.

This case arose out of Plaintiffs' request under the Freedom of Information Act to MHSAA for among other things "the criteria used to determine which ski races are allowed and which races are determined to be nonsanctioned including who will make these decisions." In addition, Plaintiffs sought the bylaws of MHSAA. App. 10a.

MHSAA did not respond to the inquiry and when Plaintiffs filed this suit, demurred, stating Defendant is not subject to the Freedom of Information Act. App. 12a.

ARGUMENT

The Michigan Freedom of Information Act, MCL 15.231 et. seq., was enacted in 1977, "to provide for public access to certain public records of public bodies."

In Section 1 of the statute the legislature made clear its commitment to open records regarding the affairs of government and its official acts.

> (2) It is the public policy of this state that all persons, ***, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process. MCL 15.231(2).

In succeeding sections of the statute, the legislature defined those public bodies that are required to share their records of official acts and the affairs of government.

The question in this case is whether MHSAA is such a public body.

Section 2(d) of the FOIA defines the term, public body. In addition to state officers and agencies of the legislative branch of state government, subsections (d)(iii) and (d)(iv) define certain agents of government as public bodies.

(d) "Public body" means any of the following:

(iii) A county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof.

(iv) Any other body which is created by state or local authority or which is primarily funded by or through state or local authority.

The question in this case is whether or not documents held by Appellee/MHSAA are available for public inspection, because: (1) MHSAA is an agency of a public body (Section 2(d)(iii)) or (2) because it is primarily funded by or through a public body. (Section 2(d)(iv)).

Specifically, Appellants/Plaintiffs seek the MHSAA rules for determining when a non-MHSAA athletic function is sanctioned.

A holding that MHSAA is a "public body" under FOIA for purposes of the Plaintiffs'/Appellants' FOIA request, would require MHSAA to produce upon receipt of a request under the FOIA the rules and regulations by which non-MHSAA athletic events are sanctioned, or not. Such a holding does not require that MHSAA be a municipal corporation or a public body under the Open Meetings Act or even a public body under FOIA for all purposes. Nor does such a holding mean that all MHSAA records are subject to disclosure under FOIA. As a public body under FOIA, MHSAA must provide access only to records in its possession that relate to the "performance of an official function." MCL 15.232(e).

Section 2(e) of the FOIA defines a public record that is subject to disclosure as:

> ...a writing prepared, owned, used in the possession of, or retained by a public body **in the performance of an official function**, from the time it is created. MCL 14.232(e). (emphasis supplied.)

If MHSAA is a public body because it is an agency of the schools or primarily funded by government funds, then its records, such as the rules and regulations for interscholastic athletic competition, would have to be disclosed by it pursuant to a FOIA request. When MHSAA promulgates rules and regulations for the sanctioning of interscholastic athletic competition, it is performing an official governmental function. That does not mean that other records of MHSAA that do not reflect performance of a governmental function would be subject to the FOIA.

Amicus submits that in this kind of situation this Court should conduct a factual inquiry into the relationship between government and the private entity. If, based upon

that factual inquiry, the court determines that a private entity is receiving public funds to provide a governmental service in the stead of government, then the entity should be treated as an agency of government and the records in its possession which reflect on its public function should be public records under the FOIA. That factual inquiry determines whether an entity such as MHSAA is a public body and the extent to which records in its possession are public records.

Amicus submits that such a factual inquiry in this case will lead to a determination that MHSAA is a public body. But once the court makes that determination that MHSAA is a public body, only those records which reflect on its performance of an official governmental function need be disclosed.

The limited holding sought in this case is that MHSAA is an agent of Michigan public schools by reason of its relationship to the schools and its funding, and thus a public body under the FOIA to the extent that it provides a governmental service. MHSAA assists the schools in education by providing "the opportunity to participate in athletics designed to meet the needs and abilities of all" and by providing the "rules and regulations and interpretation thereof to carry out the foregoing."[2] This function together with its source of funding from gate receipts from interscholastic athletic tournaments makes it appropriate for it to be accountable to the public. Such a holding would require MHSAA to reveal, pursuant to a FOIA request, those documents which reflect its performance of an official function, such as the promulgation of rules and regulations governing the interscholastic athletics engaged in by Michigan public school children under its mandates.

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[2] Articles of Incorporation of MHSAA. Court of Appeals Opinion, App. P. 46a-47a .

Amicus Curiae submits that such a result is not only appropriate, but necessary if the promise of the Freedom of Information Act of an informed public is to be achieved.

I. IS THE MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION AN AGENCY OF LOCAL SCHOOL DISTRICTS AND THEREFORE A PUBLIC BODY SUBJECT TO THE MICHIGAN FREEDOM OF INFORMATION ACT? (ISSUE I)

The FOIA clearly contemplates that agents of public bodies can be required to produce the documents relating to their relationship with government. That is to say to the extent an entity is an agent of a public body, its records become public records.

Section 2(d) of the FOIA states that a public body means:

> (iii) A county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof. (emphasis supplied)

Section 1(d)(iii) recognizes that when a public body delegates a governmental function or a portion of a governmental function to a non-governmental body as its agent, the public should not lose access to the records of that relationship or of the performance of a governmental function. In this case a clearly governmental function, the organization of athletic competition in Michigan public schools, has been delegated to the Defendant/Appellant. See Richards v. Birmingham School District, 349 Mich 490, 83 NW2d 643 (1957).[3]

The rules by which the athletic competitions are conducted in public schools, formerly published in the Administrative Procedure Act of the State of Michigan, are still developed by MHSAA in its reincarnation as a private non-profit corporation. Surely, the mere change in form from a governmental entity created by statute to a private non-

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[3] It may not be said that defendant district, in allowing athletic competition with other schools is thereby engaging in a function proprietary in nature. On the contrary, it is performing a governmental function vested in it by law. Birmingham, p. 506.

profit does not deny the public access to documents setting forth the rules of interscholastic athletic competition for public school students. Is the public not entitled to see the rules of engagement promulgated by this agent of the public schools? The change in form may limit public access to records that do not reveal MHSAA's performance as an agent of government, but it should not limit access to the rules of engagement which MHSAA promulgates for public schools.

The evidence on this record indicates that the governmental body, i.e. Harbor Springs Public Schools, did not have the MHSAA rules regarding the determination of which non-MHSAA athletic events were sanctioned or non-sanctioned. The public body responsible for the education of Plaintiffs/Appellants' son and his athletic development, Harbor Spring Public Schools, did not know why MHSAA determined that a particular non-MHSAA ski race was non-sanctioned. The rule-making authority for this determination had been delegated by the school to Defendant/Appellee, MHSAA. Surely no one would argue that Plaintiffs were not entitled to see the rules pursuant to which their son had been disqualified from participating in the remainder of the high school ski season including the finals. Yet that is precisely what happened and will continue to happen unless this court enforces the clear language of the FOIA and orders MHSAA to supply those rules in its capacity as the agency of the Harbor Springs Public Schools for athletic competition.

Regulating public school interscholastic athletic competition is a proper governmental function. MHSAA requires all member schools to adopt a resolution delegating the regulation of this governmental function to the Superintendent of Public Instruction. That individual in turn sits on the board of directors of MHSAA as an ex

officio, non-voting member/. Michigan public schools are also required by MHSAA to adopt the rules and regulation of MHSAA as their own and must promise to enforce those rules. Yet MHSAA claims that it need not provide copies of those rules to the public.

Such a position violates due proves. Disqualifying an athlete can have far reaching consequences. Athletic achievement in high school can lead to scholarships to attend college or a career in professional sports. Refusing to reveal why an athlete might be disqualified or why he was disqualified is not fair play and does no afford substantial justice.

Amicus Curiae submits that to the extent that MHSAA is performing a governmental function, i.e. acting as the agent of public schools for the setting of rules for inter school athletic competition, its records are public records. That is not to say that every record of MHSAA is public, nor that its employees are public employees or that its meetings would necessarily be open to the public.

But if MHSAA is an agency of the school districts, which it surely is, then the records relating to that agency are subject to public review under the procedures set forth in the FOIA upon a request to MHSAA.

Nor would Michigan be alone in finding such a result appropriate.

One of the first cases to explore the right of access to records in the hands of a private entity under a state public records law was **Fritz v. Norflor Const. Co.**, 386 So 2d 899 (Fl App, 1980).

In Fritz, the Court found that engineering records with regard to a public wastewater treatment facility in the hands of a private engineering company were public records subject to disclosure upon a proper request by a successor engineering firm.

The Florida statute, FLS 119.07 provided that "Every person who has custody of public records shall permit the records to be inspected and examined by any person desiring to do so at reasonable times, under reasonable conditions, and under supervision by the custodian of the records or his designee."

Records were defined as documents and information received in a transaction of official business by any agency.

Agency was defined as "any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency." FLS 119.011

The Court stated, "We agree with the lower court's determination that Boyle is an "agency" under section 119.112920 insofar as it performed services for the City as the City Engineer relating to the treatment plant. It could therefore be required to disclose any "public records" it may have in a proper proceeding."[4] Id. P. 901.

The Court also noted:

"As the Supreme Court points out in the Shevin[5] case, it may be necessary to determine the nature of the material which falls in the middle of the "public" versus "non-public" records spectrum on a "case by case" basis, after an in camera inspection by the circuit judge." Id. P. 901.

The courts of Florida in the ensuing years have considered this issue in several different factual situations, developing a series of questions to assist in the evaluation of

[4] The Fritz court denied Plaintiff relief because of procedural deficiencies in plaintiff's request, but nonetheless indicated that a proper request would yield the documents sought from the private entity agent of government.

[5] Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc., 379 So2d 633 (Fla. 1980)

the right of public access to documents held by private entities in the service of government. In Dade Aviation Consultants v. Knight Ridder, Inc., 800 So 2d 302 (Fla App, 2001) the newspaper sought the release of documents showing the use of lobbyists by Dade Aviation Consultants, a joint venture consisting of 8 private engineering and construction firms created to bid on the renovation of the Miami International Airport. The joint venture was created by an agreement between the 8 firms; the joint venture in turn entered into an agreement with the County for the renovation of the airport.

Like MHSAA the sole purpose of DAC was to serve a public body, the Dade County Aviation Department in its renovations of the airport.

The Florida Public Records statute provided that the public is entitled to see records of all agencies, including any "business entity acting on behalf of any public agency." Fla. Stat. §119.011(2).

The Court in DAC stated that whether or not a private entity contracting with a government agency is required to disclose records depends upon the analysis of several factors delineated in prior cases. The court identified 7 factors and stated that it is the totality of factors that controls the final determination. Those factors were the following:

1. Funding of the private entity,
2. Commingling of public funds with the entity's funds.
3. Governmental function,
4. Decision making process
5. Regulation by the public entity
6. Creation
7. Financial Interest of the public body.

The manner in which the Florida Supreme Court applied these seven factors in the DAC case is instructive.

1. Funding: The court found that the receipt of county funds by DAC pursuant to a contract was public funding. Here MHSAA is funded almost exclusively by the receipts from tournaments involving the athletic performances of public school children.. Tickets are sold by the schools and the receipts remitted to MHSAA after deducting for the school's expenses in putting on the tournament.

2. Commingling of funds: The court found that all the money received by DAC went into providing the governmental services for which it had contracted. The same is true of MHSAA. All of the money received from the tournaments goes to providing the interscholastic athletic events enjoyed by public schools.

3. Public Property: DAC performed all of its activities on public owned property. MHSAA has separate offices, but its tournaments are performed on public property; to wit, public school athletic facilities.

4. Decision making process: The Florida court found that DAC was a public entity because the services it was performing were governmental services which would have been performed by the Dade County Aviation Department if the consulting joint venture had not been hired. In other words this was a case in which the private entity acted in lieu of the County.

In the case at bar, MHSAA is performing a government function, i.e. the providing of interschool athletic competition, including the promulgation of the rules of engagement, in the stead of the school districts. Richards v. Birmingham School District,

349 Mich 490, 83 NW2d 643 (1957). The rules of MHSAA are the school's rules; the MHSAA decision as to a non-sanctioned ski race is the school's decision.

5. Regulation by a public entity: The Florida Supreme Court found that there was substantial control over DAC by virtue of the performance requirements in the contract. Also DAC was viewed as "an extension of the Department's senior management levels." Dade, at p. 306.

Here, MHSAA dictates to the public schools the rules of interscholastic athletic competition. But this fact only bolsters the governmental agency status of MHSAA.

6. Creation: DAC was not created by government, a factor that belied public body status. MHSAA's status is not so clear. Although not created directly by government, its board consists of public school employees, one parochial representative and the public official, the Superintendent of Education and it is a successor to a public board that performed similar statutorily mandated services.

7. Financial interest: The Florida Supreme Court found that the government had no direct financial interest in DAC. But the court felt that the fact that the benefits in the long run from the work was for government, that the County did have an indirect financial interest in DAC.

Looking at MHSAA, it is clear that although the schools do not "own" MHSAA, they have placed their money earning power of interscholastic athletic events into the hands of MHSAA. Although the schools have not retained a direct financial interest, the schools do control the flow of money to MHSAA. If a school withdrew from MHSAA, it could build its own network and draw the income now diverted to MHSAA to the school itself.

Thus, just as the Florida Supreme Court found that DAC was a private entity whose documents relating to the renovation of the Miami International Airport were subject to public disclosure, this court should find MHSAA is subject to the Michigan FOIA.

The Florida Supreme Court also distinguished the DAC facts from other cases and fact situations where the government contract was only one of many clients of the private entity. In those cases, the private entity's records were not subject to disclosure.

For example, in News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectual Group. Inc. 596 So 2d 1029 (Fla. 1992), the case in which the Florida Supreme Court first articulated the seven factors considered above, the Court found that an architectural firm that had one contract with a public entity was not subject to the public records law.

No one would suggest that a private entity that had only one contract with a public entity would necessarily be a public agency and subject to the Michigan FOIA. But where the work of the entity for government is as pervasively imbued with governmental functions as MHSAA, the simple application of agency law mandates that this entity be treated as an agency of government and subject to the disclosure of records that clearly reflect its work for the public. Certainly in this case the document developed by MHSAA as the rules of engagement and the rules for disqualification because of participation in a non-sanctioned event for public school athletes, should be a public record, available for inspection by the public, whether those documents were in the hands of the schools or in the hands of MHSAA.

Any other result is putting form over substance and is contrary to the language of the FOIA.

As the Florida Court said in summarizing a series of cases that had ordered private companies to disclose documents, "These were not business entities with a broad client base, that happened to perform an isolated contract for a government client. These cases illustrate the principle that when a private entity undertakes to provide a service otherwise provided by the government, the entity is bound by the act, as the government would be." Dade, p. 307.

The factors developed by the Florida Supreme Court were also adopted by the Colorado Court of Appeals. In Denver Post Corp. v. Stapleton Development Corp., 29 Med L Rptr 1185 (Colo Court of Appeals, 2000) a private non profit incorporated by a public entity was found to be subject to the open records law. The entity was funded 70% by private funds and 30% by public funds. The Colorado statute in effect at the time of this case provided access by the public to:

> All writings made, maintained, or kept by the state, any agency, institution, or political subdivision of the state, or that are described in 29-1-902, C.R.S. and held by any local government-financed entity for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds. 24-72-202(6)(a)(1) C.R.S.1996.

Defendant Stapleton Development Corp. (SDC) had refused to produce bid proposals submitted to it for the development of the former Stapleton International Airport. The property was public property. However, SDC's employees were not public employees and received no public benefits.

The Court found that SDC was subject to the Colorado Open records Act stating.

> It is apparent that Denver retains significant control over SDC through its appointment and approval of SDC's board of directors and its provision of substantial funds to SDC. In addition, SDC oversees the management and disposition of over 2900 acres of publicly owned property in addition to other acreage that is designated for parks and open space. Denver benefits from the disposition of this property in several ways, including that the proceeds are used to reduce its indebtedness on bonds issued for the new airport. Nevertheless, SDC, rather than Denver, will be in charge of developing and implementing numerous infrastructure improvements for the Stapleton site, and ultimately, disposing of this property. Id p. 1190.

Here again MHSAA oversees the management of the interscholastic athletic playoffs for every public school athlete in this state. MHSAA is in charge. Public bodies, the school districts, determine the members of the MHSAA board. MHSAA should be treated as an agency of government.

In 1981, the Arkansas Supreme Court found that the Arkansas Intercollegiate Athletic Association was a public body and its records subject to disclosure. Arkansas Gazette Company v. Southern State College, 273 Ark. 248; 620 SW2d 258; 7 Media L. Rep. 1837 (1981). The Arkansas statute on public records at that time provided for access to records which "constitute a record of the performance or lack of performance of official functions which are or should be carried out by a public official or employee, a governmental agency, or any other agency wholly or partially supported by public funds or expending public funds." Ark. Statutes 12-2803. This language mirrors the purpose clause of the Michigan FOIA. See also Harristown Development Corp. v. Pennsylvania, 532 Pa 45; 614 A2d 1128 (1992) (Non profit corporation leasing $1.5 million worth of real estate to state was subject to public records act.) Indianapolis Convention & Visitors Assn, Inc. v. Indianapolis Newspapers Inc., 577 NE2d 208; 19 Media L. Rep. 1488, (Ind, 1991) (non-profit entity providing public relations for publicly owned convention center

subject to public records act.) Carter v. Fench, 322 So 2d 305 (La App, 1975) (student association of public university subject to public records law as it related to the receipt or payment of money).

In the case of Toledo Blade Co. v. University of Toledo Foundation, 65 Ohio St. 3d 258, 20 Med. L. Reptr 1220, (1992), the Supreme Court of Ohio held that the University of Toledo Foundation was an agent of the University and subject to Ohio's public records laws and ordered the disclosure of contributors, despite the fact that the entity was a private nonprofit corporation created from two other public organizations that had given up many of its public amenities such as a favorable lease and public funded health insurance for its employees.

The Ohio statute like the Michigan statute defined a public office as "any state agency, public institution, political subdivision, or any other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government." The records of such public offices are subject to disclosure under Ohio law. After citing several other Ohio cases wherein private entities were held to be public offices subject to the open records law, the Court reviewed the status of the Foundation. Like the MHSAA, the Foundation had close ties to the university and was a successor to an organization that was clearly a public office. Like MHSAA the Foundation was formed to privatize what had formerly been a public function. Like MHSAA the new entity took steps to distance itself from its former status. But said the court, the "foundation's essential purpose and relationship with the university, moreover, remained unchanged." Just like MHSAA the Foundation continued to perform the same governmental function that its predecessor had performed for the same public entity.

The Ohio Supreme Court therefore held that the Foundation was a public office under the public records act, making its records subject to disclosure to the public.

The Court also indicated that even if the Foundation was not a public office as defined by the public records law, its records, reflecting the performance of a governmental function might nonetheless be subject to disclosure citing Mazzaro v. Ferguson, 49 Ohio St 3d 37, (1990). In that case the city auditor had delegated a part of an audit of the city to a private firm. The private firm was ordered to disclose the records it had created for the City. "Such records must be disclosed by a public office when a private entity performs the duties of a public office, the public office is able to over see the private entity and the public office has access to the records produced by the private entity." The obligation to produce the public record therefore fell on the private entity as well as the public body.

Amicus curiae submits that a similar analysis must be made in this case. MHSAA states as its purpose that it is established,

> To create, establish and provide for, supervise and conduct interscholastic programs throughout the state consistent with the educational values of the high school curriculums...

To be a member, a school board must pass a resolution that delegates to the

> Superintendent or his/her designee(s) the responsibility for the supervision and control of said activities, [i.e. inter school athletic competition.]

Furthermore, the member board must

> accept the Constitution and By-Laws of [MHSSA] and adopts as its own the rules, regulations and interpretations (as minimum standards), as published in the current HANDBOOK and qualifications as published in the BULLETIN as the governing code under which the said school(s) shall conduct its program of interscholastic activities and agrees to primary enforcement of said rules, regulations, interpretations and qualifications. In addition, it is hereby agreed that schools which host or participate in the

> association's meets and tournaments shall follow and enforce all tournament policies and procedures. Court of Appeals Opinion, App. P. 47a and App. p. 31a.

In other words, a member school district must accept as the rules of engagement the handbook developed by MHSAA and must follow and enforce all tournament policies and procedures established by MHSAA. Clearly MHSAA is the agency of the schools for interschool athletic competition.

The Florida seven part test is a logical one and is the essence of the argument made by Plaintiffs/Appellants. Looking at the Florida factors again, they are:

1. Funding of the private entity
2. Commingling of public funds with the entity's funds
3. Governmental function
4. Decision making process
5. Regulation by the public entity
6. Creation
7. Financial Interest of the public body.

FUNDING: It is appropriate to look at the funding to a private entity by government. In fact the next section of this brief will explore another section of FOIA which requires entities that are primarily funded by a governmental entity to be subject to FOIA. In this case MHSAA has admitted that it is primarily funded by the receipts from the athletic tournaments it hosts. Although MHSAA has taken the position that this money is its money and does not come from the schools, it is clear that it is funding achieved by MHSAA from the athletic performance of public school students. There would be no attendance by the spectators at these tournaments to see professional athletes or

exclusively non-public school athletes. It is the public school children who participate in these events who are the draw and the monies received from their athletic endeavors are the proceeds upon which MHSAA operates. If these monies are not public monies, what are they? They are certainly not the fee for putting on the tournament. Instead these monies are an entrance fee to witness the athletic prowess of public school children. COMMINGLING OF FUNDS: Another indicia of MHSAA's agency status is the fact that the gate receipts constitute the majority of its funding. Over 90 % of its funding comes from the receipts at the tournaments. Not only are these funds commingled with the other receipts of MHSAA without regard for which monies came from where, but MHSAA could not operate without these receipts from public school tournament play. GOVERNMENTAL FUNCTION: Again the courts of this state and the legislature have recognized that athletics and athletic competition are an important part of the educational curriculum. We expect our children to have a sound mind and a sound body. The athletic competition which MHSAA regulates is a proper governmental function of the public schools. By regulating the athletic competition , MHSAA becomes a public body. DECISION MAKING PROCESS. MHSAA is making the decisions that used to be made by a public body. Its predecessor published its rules of engagement in the Michigan Administrative Code. MHSAA is acting in the place and stead of the schools in organizing the athletic competitions and developing the rules.

The resolution which every school board must pass in order to belong to MHSAA states clearly that MHSAA is a direct extension of the schools. It is helpful to break down the content of the resolution to see the extensive grant of governmental authority to MHSAA.

The resolution which MHSAA requires schools to adopt is as follows:

"The Board of Education/Governing Body hereby

[1]delegates to the Superintendent[6] or his/her designee(s) the responsibility for the supervision and control of said activities, and hereby

[2]accepts the Constitution and By-Laws of [MHSAA] and

[3]adopts as [the Board of Education's] own

> [a] the rules, regulations and interpretations (as minimum standards), as published in the current HANDBOOK [of MHSAA] and
>
> [b] qualifications as published in the BULLETIN [of MHSAA]

As the governing code under which the said school(s) shall conduct its program of interscholastic activities and

[4] agrees to primary enforcement of said rules, regulations, interpretations and qualifications.

[5] In addition, it is hereby agreed that schools which host or participate in the association's meets and tournaments shall follow and enforce all tournament policies and procedures. Court of Appeals Opinion, App. P. 47a and App. p. 31a.

In other words the schools that join MHSAA have ceded to MHSAA the development of the rules of engagement for all interscholastic activities, not just athletics, and have agreed to enforce those rules of engagement as their own.

The decision making process for interscholastic activities has been totally ceded to MHSAA, making them an agency of the schools and subject to FOIA.

REGULATION BY A PUBLIC ENTITY. Although Harbor Springs Schools may not have any direct control over MHSAA, it would participate if a member of its staff were placed on the board of MHSAA. Although there is no direct control of MHSAA, the board of MHSAA is made up, according to its by laws of public school employees with the exception of one parochial school representative and the Superintendent of Public

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[6] Superintendent of Public Instruction who is an ex officio member of the MHSAA.

Instruction, a public body in his own right. So in a sense MHSAA is regulated by several public entities.

CREATION. It does not appear that MHSAA was created directly by public bodies. However, as noted by Plaintiffs/Appellants in issue 2, MHSAA has no owners other than its members, the overwhelming majority of whom are Michigan public schools. So while MHSAA may or may not have been created by a public body, it is owned by public bodies.

FINANCIAL INTEREST. The public body school boards do not have a direct financial interest in MHSAA. However the earning capacity of their public student body to the tune of $6 million dollars a year is given to MHSAA. Amicus curiae submits that this represents a substantial financial interest of public schools all over this state in MHSAA.

BENEFIT. For whose benefit does MHSAA function? Clearly it operates for the benefit of the public school boards by performing the governmental function of managing interscholastic competition. It also works for the benefit of every public school child who participates in an interscholastic event in this state.

In short, whatever the language of MCL 15.3(d)(iv) means, it clearly applies to MHSAA.

An agency relationship is defined under Michigan law as "a relationship which results from the manifestation of consent, by one person to another, that the other shall act on his behalf and subject to his control, and consent by the other person to so act." 1 Michigan Law & Practice, Agency, p. 275 (2nd ed. 2003).

Based upon the facts in this case, the law of agency in Michigan and the language of the FOIA, MHSAA is an agency of the public schools of this state, is a public body for

purposes of FOIA and is required to produce the public records reflecting its "performance of an official function" (MCL 15.232(e)) which includes the documents sought by plaintiffs/appellants.

II. IS THE MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION PRIMARILY FUNDED BY OR THROUGH STATE OR LOCAL AUTHORITY AND THEREFORE A PUBLIC BODY SUBJECT TO THE MICHIGAN FREEDOM IF INFORMATION ACT?

Section 2(d))iv) of the FOIA provides that a public body under the definition of the act includes:

> **(iv) Any other body which is created by state or local authority or which is primarily funded by or through state or local authority.**

This section of FOIA extends the definition of public body to private entities that receive substantial amounts of public monies.

The Michigan Court of Appeals has had several occasions to address this section of the FOIA. In Kubic v. Child & Family Services of Michigan, Inc., 171 Mich App 304; 429 NW2d 881 (1988) the Court of Appeals found that an entity that received less than 50 % of its budget from government was not a public body. In Jackson v. Eastern Michigan University, 215 Mich App 240; 544 NW2d 737 (1996) the Court of Appeals held that an organization that received over 50% of its budget from one governmental source was a public body for purposes of the FOIA. In another published decision last year, Sclafani v. Domestic Violence Escape, Inc., 255 Mich App260; 660 NW2d 97 (2003), the Court of Appeals found that an organization that received over 50% of its funding from multiple government sources could be a public body under the FOIA.

Sclafani was remanded to the trial court for a finding on the second factor in the analysis of public body status of a private entity, whether or not the government funds were provided as a fee for services rendered or as general funding.

In the case of State Defender Union Employees v. Legal Aid & Defendant Ass'n, 230 Mich App 426; 584 NW2d 359 (1998), the Court of Appeals held that the term funded "should be construed to mean the receipt of a governmental grant or subsidy." Id. At p. 432. On the other hand if the revenues are generated from a fee for service transaction with various governmental entities, this does not constitute governmental "funding" within the meaning of Section 2(d)(iv) of the FOIA.

Such a provision and the courts' interpretations thereof are consistent with the Article 9 § 23 of the Michigan Constitution of 1963 which gives to citizens of Michigan the right to inspect the financial records of Michigan government.

> Sec. 23. **Financial records; statement of revenues and expenditures.** All financial records, accountings, audit reports and other reports of public moneys shall be public records and open to inspection. A statement of all revenues and expenditures of public moneys shall be published and distributed annually, as provided by law. Art. IX, §23 of the Michigan Constitution of 1963.

For example, if a lawn mowing service only had contracts with governmental bodies, its records would not be subject to disclosure under the FOIA. Although its funds come primarily from government, it is providing services for a fee and not receiving a grant. The public would have access to the checkbook of government and would be able to see the amount of money being paid to the lawn service. But the public would not have access to the payroll of the lawn service.

With an entity like MHSAA, however, the receipt of money is not for services. MHSAA receives all of the gate receipts from the tournaments which it sponsors from the

schools after the schools deduct a fee for governmental services of rent and electricity. App. P.

The question in this case is whether or not the gate receipts constitute funding by a state or local authority.

There is no dispute that MHSAA is primarily funded by revenues from gate receipts from athletic tournaments it sponsors for its member schools and their students. App. P. 15a. In fiscal year ending July 2000, $6,158,319.00 of its total revenue of $6,866,406.00 came from athletic tournament and meet income. Court of Appeals Opinion, Dissent, p. 55a.

Thus, MHSAA clearly falls within the definition of "public body" under Sec. 2(d)(iv) of the FOIA if the gate receipts constitute "funding by a state or local authority."

Amicus curiae respectfully submits that the gate receipts from athletic tournaments constitute governmental funding of MHSAA. It is the athletic performance of public school students that attracts the audience. It is the schools that oversee and collect the sale of tickets. Whether the school or MHSAA collect the gate receipts, the funds do not lose their character. They are fees paid for admission to the tournament play, not a fee for services provided by MHSAA.

It must be remembered that the schools have delegated their governmental function of providing athletic as a part of a public school education. MHSAA in organizing the tournaments is performing a delegated governmental function. When MHSAA receives the gate receipts it is receiving the funding to provide the governmental function delegated to it by the schools. It is not a fee for services; it is in the nature of a grant. MHSAA receives only the gate receipts whether 100 people attend a tournament

or 1000 people attend the tournament. The amount remitted by the schools to MHSAA is not a fee determined by MHSAA for its services, but a grant of all the proceeds less expenses whether the amount is $6 or $6 million.

In return for this grant of monies, MHSAA has promised to develop the rules and procedures for interscholastic athletics regardless of the amount of money it receives.

It is does not receive a fee for services. Instead the schools have given a grant of the proceeds of the athletic tournament as a part of the delegation of educational duties to MHSAA.

Therefore, MHSAA is primarily funded by government and is a public body whose records, to the extent they disclose an official function such as rule making and setting criteria for the sanctioning of non-MHSAA events in which high school athletes participate, shall be disclosed.

III. HOLDING MHSAA ACCOUNTABLE TO THE PUBLIC FOR ITS OFFICIAL FUNCTIONS IS CONSISTENT WITH THE MICHIGAN CONSTITUTION AND THE PUBLIC'S RIGHT TO KNOW.

MHSAA's mission as defined in its Articles of Incorporation is "to create, establish and provide for, supervise and conduct interscholastic programs throughout the state consistent with...the interest in physical welfare and fitness of the students...by giving the opportunity to participate in athletics..." But in providing this opportunity it also establishes the rules and regulations and interpretations of those rules and regulations. Public school children and public schools must abide by those rules to participate in MHSAA tournaments. Furthermore these tournaments are the only

tournaments in which high school student athletes can compete in an interscholastic setting.

Interscholastic achievement is important for its educational value. School athletics provide students opportunities to develop loyalty and school spirit, to practice teamwork, hard work, discipline, sacrifice, leadership and sportsmanship and to gain lifetime appreciation for the arts, sports and healthy lifestyle. But interscholastic athletics also brings an athlete to the attention of colleges for scholarships and professional sports teams should the athlete want to make sports his or her career or an avenue for paying for higher education. Thus, the rules and regulations promulgated by MHSAA have a very real impact on public school athletes.

Given the importance of these rules and regulations promulgated by MHSAA, it is appropriate for MHSAA to be subject to the Freedom of Information Act to the extent that it is performing the official function of promulgating the rules and regulations that govern interscholastic athletic competition. Such a holding is consistent with the goals of the freedom of information act and does not unduly burden MHSAA.

As this court noted in Mager v. State of Michigan, 460 Mich 134, 595 NW2d 142 (1999), the core purpose of the Michigan FOIA is to give full and complete information to the public regarding the affairs of government. This Court also noted with approval the federal courts' description of the purpose of the federal FOIA statute, to wit, contributing significantly to public understanding of the operations or activities of the government.

Where a private non-profit such as MHSAA performs a governmental function such as promulgating the rules and regulations by which the government will perform its

governmental activity, the documents which evidence the exercise of that governmental function should be disclosed to the public upon request. If the documents contribute to public understanding of "what the government is up to", why should they be withheld just because they are in the hands of a non-profit such as MHSAA? This is not to say that all documents in the possession MHSAA should be subject to disclosure under the FOIA, nor that copies of public records in the hands of private companies must always be disclosed to the public upon request.

But where as here the non-profit entity is so inextricably tied up in the performance of a governmental function, where the non-profit entity is an agent of government, it should be subject to the FOIA to the extent that it serves as an agent and the documents it develops as an agent tell the public "what its government is up to".[7]

In this case that means that MHSAA must respond to Plaintiffs' FOIA request and provide a copy of the rules for determining that an athletic event is sanctioned by MHSAA. It would require MHSAA to respond to a FOIA request for any of the rules it promulgates in connection with interscholastic athletic competitions.

Such a holding does not mean that the salaries of its employees would be public nor a copy of the lease for its building. But it would mean that documents in its possession reflecting directly upon services which it performs for the schools would be subject to disclosure under the FOIA.

In the case at bar the school district relied upon the representation of MHSAA that the Plaintiffs' son was ineligible to compete because he had competed in too many nonsanctioned events. It is only fair that MHSAA, as the agent of the school for such

[7] See Protecting the Public's Right to Know: The Debate over Privatization and Access to Government Information Under State Law, 27 Fla St ULRev 825 (summer, 2000).

decision, respond to Appellants'/Plaintiffs' request for information on the rules for sanctioned events.

As the Michigan Freedom of Information Act says, all persons are entitled to full and complete information regarding the affairs of government.

Amicus curiae Michigan Press Association respectfully requests that this Court reverse the Court of Appeals, affirm the Emmet County Circuit Court, hold that MHSAA is a public body as an agency of the Harbor Springs Public Schools and order Appellee to provide Appellants' with the rules of engagement for Michigan public school children.

Respectfully submitted,

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Dated: February 16, 2004

STATE OF MICHIGAN

IN THE SUPREME COURT

MARTIN B. BREIGHNER III and KATHRYN BREIGHNER	Supreme Court No. 123529
Plaintiffs/Appellants,	Court of Appeals No. 243618
-vs-	Lower Court No. 01-6716 CZ
MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC., a Michigan non-profit corporation,	Trial Judge: Hon. Charles W. Johnson
Defendant/Appellee. /	

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PROOF OF SERVICE

STATE OF MICHIGAN)
)SS
COUNTY OF WASHTENAW)

Maureen O'Sullivan, being duly sworn, deposes and says that on the 16th of February, 2004, she served a correct copy of Amicus Curiae Brief In Support Of

The Appeal Of Appellants/Plaintiffs in the above-entitled matter upon by enclosing said document(s) in an envelope properly addressed to Wayne Richard Smith, P.O. Box 4677, Harbor Springs, MI 49740 and Edmund J. Sikorski, Jr., 3300 Washtenaw Avenue, Ste. 240, Ann Arbor, MI 48104 with postage fully prepaid and by depositing said envelope in the United States mail, Detroit, Michigan.

Maureen O'Sullivan

The signator is known to me and acknowledged the foregoing instrument this 16th day of February, 2004.

Debra Bailey Miller, Notary Public
Livingston County, Michigan
(Acting in Washtenaw)
My Commission expires: 8/20/05

DEBRA BAILEY MILLER
Notary Public, Livingston County, MI
My Commission Expires Aug. 20, 2005